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In the Supreme Court of the United States

October Term, 1962

CLAUDE DENNIS, *Petitioner*

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

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No.....

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CLAUDE DENNIS, *Petitioner*

v.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, a corporation, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Utah, entered in the above-entitled case on May 29, 1962.

OPINIONS BELOW

The opinion below was filed in the Utah Supreme Court on May 29, 1962. A corrected opinion was later filed and dated back to the same date. The original opinion is reported in the Advance Pacific Reporter at 372 P.2d 3. The corrected opinion is not yet reported

but is attached hereto as Appendix A. The original opinion is attached hereto as Appendix B.

JURISDICTION

The judgment of the Utah Supreme Court was rendered on May 29, 1962. The petition for rehearing filed by petitioner herein was denied by the Utah Supreme Court on August 7, 1962. (Appendix C.) Jurisdiction to grant this petition is sustained by Section 1257(3), Title 28, U.S.C.A.

QUESTIONS PRESENTED FOR REVIEW

The Supreme Court of Utah set aside a jury verdict for petitioner in a case filed by a railroad employee under the Federal Employers' Liability Act. The question presented for review is whether that holding is in conflict with controlling decisions of the United States Supreme Court. It is petitioner's position that the Utah Court improperly held as a matter of law:

(a) That respondent was not negligent in overexposing petitioner to freezing weather.

(b) That petitioner's own conduct was the sole proximate cause of his injuries; and

(c) That petitioner assumed all risks incident to his employment.

The decision of the Utah Court is in conflict with *Anderson v. Atchison, T. & S.F.R. Co.* 333 U.S. 821,

68 S.Ct. 854, 92 L.Ed. 1108 (1948); *Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444 (1943); *Blair v. Baltimore & O.R. Co.*, 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490 (1945); *Boston & Maine Railroad v. Mecch*, 156 F. 2d 109 (1st Cir. 1946) (Cert. Den. Oct. 28, 1946), 329 U.S. 763, 67 S.Ct. 124, 91 L.Ed. 658; *Coray v. Southern Pacific Co.*, 112 Utah 166, 185 P. 2d 963, 335 U.S. 520, 69 S.Ct. 275, 93 L.Ed. 208 (1949); *Davis v. Virginian R. Co.*, 361 U.S. 354, 80 S.Ct. 387, 4 L.Ed. 2d 366 (1960); *Ellis v. Union Pacific R. Co.*, 146 Neb. 397, 19 N.W. 2d 641, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572 (1947); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 77 S.Ct. 457, 1 L.Ed.2d 511 (1957); *Harris v. Pennsylvania R. Co.*, 361 U.S. 15, 80 S.Ct. 22, 4 L.Ed.2d 1 (1959); *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916 (1946); *Lillie v. Thompson*, 332 U.S. 459, 68 S.Ct. 140, 92 L.Ed. 73 (1947); *Pauly v. McCarthy*, 109 Utah 398, 166 P.2d 501, 330 U.S. 802, 67 S.Ct. 962, 91 L.Ed. 1261 (1946); *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493; *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520 (1944); *Tiller v. Atlantic Coast Line R. Co.*, 128 F.2d 420 (4th Cir. 1942), 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610 (1943); *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949); *Webb v. Illinois Central R. Co.*, 352 U.S. 77 S.Ct. 451, 1 L.Ed.2d 503 (1957); *Wilkerson v. McCarthy*, 112 Utah 300, 187 P.2d 188, 336 U.S. 53, 69 S.Ct. 413, 93 L.Ed. 497 (1947).

Some of the language from the above cases is par-

ticularly applicable here. In *Lavender v. Kurn*, supra, this court stated:

> "Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.
>
> "But where, as here, there is an evidentiary basis for the jury's verdict, . . . the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

In *Tennant v. Peoria & P.U.R. Co.*, supra, this court stated:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury . . . It is the jury, not the court which is the fact-finding body . . . the very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

In *Bailey v. Central Vermont R. Co.*, supra, this court stated:

> "To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them."

In *Jamison v. Encarnacion*, 281 U.S. 635, 50 S.Ct. 440, 74 L.Ed. 1082 (1930), this court stated:

> "The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning."

And in *Rogers v. Missouri Pacific R. Co.*, supra, this court stated:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death."

This Court has recognized that a railroad's duty to exercise reasonable care extends to protection of its employees from any and all sorts of harm. See *Lillie v. Thompson*, supra, (unprotected telegraph operator criminally assaulted); *Urie v. Thompson*, supra, (exposure to silica dust); *Anderson v. Atchison, T. & S.F. R. Co.*, supra, (exposure to weather).

STATUTES INVOLVED

The Statutes of the United States here applicable are 45 U.S.C.A., Sections 51-59, commonly known as the Federal Employers' Liability Act. Sections 51, 53, and 54 are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioner, a fifty-five-year-old section hand, filed this action to recover damages for injuries sustained by

him in the course of his employment on the night of January 2-3, 1960, near Green River, Utah. He claimed that respondent negligently required him to work an overtime, hastily planned shift of approximately twelve hours on a windswept night in zero temperature, without adequate warming facilities, in order to perform a routine repair of an open joint; and that as a result he suffered frostbite, necessitating amputation of two fingers on his left hand. (R. 1-3.) The evidence supported his claim.

The track maintenance crew, of which petitioner was a member, was called on Saturday evening, January 2, 1960, to repair an open joint on the mainline track approximately sixteen miles west of Green River. The crew consisted of the foreman and three laborers, one of whom was petitioner. (R. 93.) Another crew member, Delmar H. Powell, could not be located. (R. 93, 196.) A track maintenance crew worked out of Cedar, Utah, but was not called. The open joint in question was slightly in the Cedar crew's territory. (R. 92, 96.)

A joint is the convergence point of two lengths of rail. Joints are fastened together by angle bars, bolts, and nuts on each side of the rails. An open joint is caused by the contracting of rails in extremely cold weather to the point where the bolts on one side of a joint are sheared, thus causing an undesired separation. (R. 96, 99.) The rails at the open joint in question were approximately one and three fourths of an inch apart. (R. 99.)

The repair of an open joint is accomplished by loosening the nuts on the bolts at each joint, continuing from the open joint for approximately nine joints in each direction. (R. 105.)

The rails are thirty-nine feet in length. (R. 96.) This would mean that the men were working over a total distance the equivalent of two and one-third football fields.

After the nuts are loosened, a chisel is used to pry the rails at the open joint close enough together so that new bolts and nuts can be used at the place where they have been broken. (R. 105-108.) A wrench approximately four feet in length is used to loosen the nuts.

The crew met at the toolhouse near the Green River depot at approximately 5:00 p.m. The weather was "awful cold," (R. 94.) the weather report indicating a temperature of ten degrees Fahrenheit, growing colder during the night to five degrees below zero Fahrenheit at 5:00 a.m. (Ex. 3-P.) Petitioner wore heavy underwear, a levi-type of waist overalls, heavy shirt, and heavy jacket, a sheepskin coat, heavy socks, work shoes, and two pairs of gloves, inner canvas gloves with a flannel material on the inside, and outer rubberized canvas gloves. (R. 94, 154.) Petitioner was not wearing overshoes. (R. 94, 95.)

The crew was taken by truck to milepost 571, where it was met by the signal maintainer, Bud Wernz. Wernz and the crew then proceeded by motorcar a distance of approximately three fourths of a mile to where the open joint was located. The first operation performed by the crew consisted of insertion of a "dutchman," so that the track could be used by trains while the repair work was taking place. A "dutchman" is a small piece of rail which can be inserted at an open joint by removing the angle bars, inserting the "dutchman," replacing

the angle bars, and tightening the nuts and bolts on one side of the joint. With a "dutchman" thusly inserted trains can be slowed down and moved across a joint being repaired, at from fifteen to twenty miles per hour. (R. 100, 118, 147.)

Petitioner testified that a "dutchman" is a safe temporary repair, and that on the night in question, after the "dutchman" had been inserted, one man could have remained at the site and the repair work done the following morning. (R. 119, 120, 139.) There was evidence that it is practical to issue train orders so that trains coming over a "dutchman" will know where to slow down. (R. 121.) Petitioner testified that by working in daylight, the open joint could have been repaired in four hours instead of the ten and one-half hours it took on the night in question. (R. 119, 120.) He also testified that by utilizing an extra crew and working by daylight the work could have been completed in two hours. An additional crew working at night would have shortened the task to four hours. (R. 120, 121.)

As soon as the "dutchman" was inserted, the foreman sent petitioner back to the truck, which had been left near milepost 371. This necessitated walking through eight to ten inches of snow, approximately three hundred yards. (R. 101, 102.) After the truck was driven to the site, a tie was removed and used in making a fire. However, the fire was ineffective in producing much heat because of the severe wind which was blowing from the west through the cut in which the open joint was located. (R. 105.)

At first all four men worked, with one pair pro-

ceeding west and one east from the open joint, with one man holding a lamp and the other using the wrench. (R. 211-213.) Later, the four men bunched up, working on one side, with two or three men working and the foreman supervising. (R. 106-110.) The truck driver worked at intervals, moving the truck and using the truck lights for two or three hours prior to midnight. (R. 211, 212.)

Petitioner testified that he was cold and that using his hands on the cold tools also contributed to the coldness of his hands. (R. 107.) He testified that he had never worked in weather that cold prior to the night in question. (R. 92, 127, 129, 130.)

The foreman chose to have the men take regular turns at the fire as the work progressed under his supervision. Petitioner testified:

> "A. We would alternate to go to the fire unless a train was going by and then we was all over there at the same time." (R. 149.)

Three trains went by during the night. (R. 146, 147.)

The foreman was in direct and continuous supervision of the crew throughout the night. He testified as follows:

> "Q. Mr. Chronopoulos, you have been the Section Foreman in that Green River area for several years, have you?
>
> "A. I have.
>
> "Q. But as a Section Foreman, you are the person who is in charge out there, are you not?
>
> "A. I am.
>
> "Q. And you make the decisions, do you?

"A. I do.

"Q. And you tell the men what to do, when to do it and how to do it?

"A. That's right." (R. 205.)

Petitioner testified that at approximately midnight he noticed that he had to pry the fingers on his left hand from their grip on the wrench and commented about this to the foreman. (R. 109.) At that time he also noticed a tingling sensation. They continued with their work. Later in the evening the batteries on the lights grew weak, and the lights on the truck were used to help light the area. Petitioner testified that he went to the truck at the end of the shift for the purpose of turning the truck around. This took "not over thirty minutes altogether." (R. 143, 144.) The job was finished at approximately 4:00 a.m., and the crew returned in the truck to Green River, arriving at approximately 5:00 a.m., making a total working time of twelve hours. (R. 111.) A regular shift is eight hours. (R. 92.) After arriving home petitioner noticed tingling, burning, and discoloration of his left hand. He went to see the doctor that same morning and received medication. Later he was sent to Dr. Hubbard at Price and was hospitalized. It became necessary to amputate most of the little and ring fingers on his left hand. In 1938 petitioner had lost his left middle finger due to an infection. (R. 111, 114.)

Dr. Reed Clegg testified that when a person's body temperature is reduced, his extremities are more easily subject to frostbite. Therefore, a person having cold feet is more subject to frostbite of his hands. (R. 165.) The foreman, J. G. Chronopoulos, testified he noticed when the crew first met that petitioner was not wearing

overshoes and he did not think petitioner was warmly enough dressed. He did nothing about it. (R. 132, 205, 206.)

The jury returned a verdict in the gross amount of $20,000.00 and made a reduction of $10,000.00 for contributory negligence.

The Supreme Court of Utah rendered its opinion on May 29, 1962, vacating petitioner's judgment. Thereafter petitioner filed a petition for rehearing which was denied on August 7, 1962.

In the meantime, the Utah Supreme Court found it necessary to correct the original opinion by deleting several factual errors which had been called to its attention by petitioner. See Appendices A and B.

SPECIFICATION OF ERRORS

The Supreme Court of Utah set aside a jury verdict for petitioner and directed that judgment be entered for respondent. This decision inappropriately deprived petitioner of his constitutional right to a jury trial and is based on the following prejudicial and reversible errors:

1. The Supreme Court of Utah improperly held as a matter of law that respondent was not negligent in overexposing petitioner to freezing weather.

2. The Supreme Court of Utah improperly held as a matter of law that petitioner's negligence in not leaving his work and seeking protection from the cold was the sole proximate cause of his injuries.

3. The Supreme Court of Utah improperly held

as a matter of law that petitioner was himself in the best position to judge and appraise the danger of overexposure and thus improperly resurrected the doctrine of assumption of risk as a bar to petitioner's right of recovery.

ARGUMENT

POINT 1

THE SUPREME COURT OF UTAH IMPROPERLY HELD AS A MATTER OF LAW THAT RESPONDENT WAS NOT NEGLIGENT IN OVEREXPOSING PETITIONER TO FREEZING WEATHER.

In determining whether the evidence presented a jury question on the issue of negligence "we must assume the most favorable statement of plaintiff's case to be true." See Mr. Justice Holmes per *Texas & Pacific R. Co. v. Behymer*, 189 U.S. 468, 23 S.Ct. 622, 47 L.Ed. 905 (1903). And ". . . the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury." See *Ellis v. Union Pacific R. Co.*, supra.

Factual Basis for Jury Finding of Negligence

The evidence was that petitioner had been unnecessarily exposed to twelve hours of nighttime windy weather hovering near the zero mark and had been furnished only an ineffective fire made from an old tie for the purpose of keeping warm. The crew, in repairing the open joint, was required to work a distance of nine

rail lengths in each direction from the joint. A rail is thirty-nine feet in length. Under the continuous supervision of a domineering foreman (the jury saw this man and the Utah Supreme Court didn't) the members of the crew took turns seeking warmth at the fire. The fire was of such quality that only by putting one's hands directly into the fire could any warmth be obtained. (R. 149.)

In *Bailey v. Central Vermont R. Co.*, supra, this court stated:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of the guardrail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground — all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions emphasize the appropriateness of leaving the question to the jury."

And in *Boston & Main Railroad v. Mcech*, supra, the Circuit Court stated:

> "The sufficiency of the evidence to support the verdict on the second count is at least equally clear. The defendant might have painted lines on the platforms of its washstand to indicate the extent to which locomotives overhang them and thus to warn persons on the platforms of the danger incident to standing near their inner borders, or it might even have set the platforms of its washstand back from the tracks far enough to

prevent locomotives from overhanging them at all.

"From the foregoing, it is clear that although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an 'evidentiary basis' for submitting the issue of the defendant's causal negligence to the jury, and hence that our 'function is exhausted.' Lavender v. Kurn, et al, supra [66 S.Ct. 744.]"

See also *Strickland v. Seabord Air Line R. Co.*, Fla., 80 So.2d 914, 350 U.S. 893, 76 S.Ct. 157, 100 L.Ed. 786 (1955).

Petitioner being entitled to the benefit of favorable inferences reasonably deducible from the evidence, it may not be amiss to consider what could have been done by respondent to safeguard its employees.

1. An additional crew working at night would have provided more men to hold the lights and more men to work on the joints. This would have made possible reduction of the working time from ten and one-half hours to four hours. It would also have allowed the men to spend more time at the fire.

2. The job could have been postponed until morning by using a "dutchman" and having one man posted as a flagman. Working in the daylight there would have been no need for men to hold the lights while the other men worked, or of a man operating the truck to keep its lights shining on the work. This would have provided two additional men to work on the joints and made possible completion of the work in four hours instead of

ten and one-half hours. An additional crew would have further reduced the work time to two hours.

3. The crew could have worked a short evening shift and come back the next morning to finish the job.

4. The foreman could have taken the crew to Green River after having worked five or six hours and spent an hour warming and having coffee and then returned to finish the job.

5. If the foreman thought, as he testified, that Dennis was not warmly enough dressed, he should have sent Dennis back to Green River to obtain additional clothing, especially after Dennis advised him that he was cold.

6. In view of the fact that Dennis was not wearing overshoes, the foreman should have sent another man the three hundred yards through the snow to get the truck.

In the face of the foregoing evidentiary basis for the jury's verdict, the Utah court has held that this is one of those

> "... infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." See *Rogers v. Missouri Pacific R. Co.*, supra.

Inappropriate Resolution of Facts by Utah Supreme Court

Once again the Utah Supreme Court has deprived a plaintiff of a jury trial by the inappropriate resolution of conflicting evidence. We cite a number of specific instances.

1. In its opinion the Utah Court states:

> "However, in searching for fault on the part of the railroad, it is significant to observe that there is no evidence that any one prevented or dissuaded the plaintiff from warming his hands as often or as long as he wanted to";

And again:

> "He made similar candid admissions about being kept in the cold, admitting that he had access to the fire and to the truck to warm himself at any time he wanted to."

The Utah court fails to take into consideration the fact that *the foreman was in continuous supervision of the crew throughout the night, and the procedure adopted under his supervision was for the men to take turns at the fire.* The Utah court adopted as fact an inference that plaintiff could have taken some one else's turn at the fire in addition to his own without objection from the foreman. The correct inference in petitioner's favor is that as a common laborer, working under the direction of a foreman, and knowing that they weren't going to quit until repair of the open joint was completed, petitioner would not feel that he had the pleasant alternative of being a slacker while his fellow workmen were laboring in the cold. There is no evidence that the foreman was such a generous fellow. In addition, petitioner, as a conscientious workman, would feel it his duty to stay out and do his share of the work. That was expected of him and the thing for which he was paid.

2. The Utah court states:

> "With all sympathy for the plaintiff's misfortune, and every indulgence towards his claims,

> we are nevertheless unable to perceive any basis upon which the defendant can be held in violation of its duty to exercise reasonable care for his safety. Neither party can be blamed for the cold weather. Both were fully aware of it."

Petitioner has never undertaken to blame respondent for the cold weather. The basis for petitioner's claim, which the Utah court failed to perceive, is that respondent negligently exposed him to the cold weather for an unreasonable length of time. The repair of the open joint was not an emergency. The foreman could have delayed the work until morning. However, he chose to keep the crew at work until the repair had been completed. This brings into consideration the question of time. In view of the zero weather, the wind, and the darkness, what would be a reasonable cutoff time? Suppose this crew couldn't have finished the job in less than twenty hours. Would the Utah court hold as a matter of law that twenty hours of exposure was reasonable? Here petitioner was exposed to adverse weather conditions for twelve hours. A normal shift under ordinary conditions is eight hours. (R. 92.) Should a state appellate court decide what is a reasonable cutoff time as a matter of law, or should this matter be resolved by a jury in the spirit of liberality typified by the *Bailey* case, supra?

3. The Utah Supreme Court stated:

> "It must be appreciated that the railroad is in a business which literally moves on and must be kept moving."

And again:

> "In the face of difficulties such as here arose, it must resort to the best expedient available to

> meet these responsibilities and to keep its trains running on schedule."

Who should determine what is the "best expedient available"? As we have pointed out, the jury was not obliged to find it was necessary *or even particularly important* that "in order to keep the railroad moving," petitioner's crew work through a windswept zero temperature night for a period of twelve hours. As a matter of fact, the testimony was that by use of the "dutchman" trains could have been, as they were, kept moving without interruption, regardless of whether the repair was made that night or the next morning. This is another example of an argumentative fact-finding appraisal of the evidence rather than a determination of whether there was an "evidentiary basis" for a finding in plaintiff's favor.

4. The Utah court states:

> "They claim reasonable care required these measures: (1) That the defendant should have put more men on the job, which would have shortened the time for the repair and plaintiff's exposure to the cold; and (2) that the "dutchman" (a short section of rail) could have been placed in the break and left until morning when the repair could have been done more quickly in daylight and when it was not quite so cold.
>
> "In so far as the record reveals, these claims are fashioned of nothing more substantial than conjecture and there is no reasonable basis to hold the railroad negligent on either count."

And again:

> "Nor is it shown that additional men would have shortened the time required for the repair."

The fact is, petitioner testified that an additional crew working at night could have repaired the open joint in four hours instead of ten and one-half hours; that a single crew working in daylight could have performed the repair in four hours rather than ten and one-half hours; and that with an additional crew working in daylight, they could have completed the work in two hours. (R. 119-121.)

Petitioner's opinion was based on sixteen years' experience as a section hand. Furthermore, he is supported by the facts. The evidence was that in the early evening the four men paired off, each pair working simultaneously, step by step, away from the open joint. One man would hold the light and the other man work with the wrench. Later the crew started to work on one joint at a time. The truck driver would move the truck as the work progressed in order to help with the lighting. Also, the men were taking turns at the fire. It is obvious that an additional crew would have made it possible for the men to work throughout the night on two or more joints at a time. Additional men would have been available to hold the lights, and the men would have been able to spend more time at the fire. (R. 106-110, 211-213.) If the work had been done in the daylight, it wouldn't have been necessary for men to hold the lights; and with additional men available to work on the joints, this would have shortened the work time.

The Utah court, however, found as a fact that additional men wouldn't have shortened the work time *at all*, and that petitioner's claim to the contrary is based on "nothing more substantial than conjecture."

5. In the original opinion the Utah Supreme Court stated:

> "He said that at sometime during the night he complained of being cold, and the foreman told him to get in the truck."

And again:

> "It is undisputed that the only time he mentioned being cold the foreman suggested that he go to the truck for that purpose and he did so."

The foregoing statements were deleted from the corrected opinion after being called to the court's attention by petitioner, because petitioner had denied their truth under oath. (R. 143.) For the purpose of this petition the foreman at no time suggested that petitioner get into the truck. But it is interesting to note that when the decision was made to defeat petitioner, said misapprehension existed in the mind of the Utah court.

6. In both of its opinions, the Utah court persists with the statement that the foreman and both older men testified that petitioner "went to the truck about midnight and remained there the rest of the night until the repair was completed about 4:00 a.m."

The foregoing statement is not supported by the record. The foreman testified petitioner was in the truck two hours. (R. 201.) Lee Carbjal testified petitioner was in the truck two hours. (R. 182, 183.) James Burnett never did testify as to how long petitioner was in the truck. But the two hours supported by respondent's witnesses cannot be taken as true. Petitioner testified:

> "Q. Now, Mr. Dennis, I will ask you if this is not a fact that along about midnight you

reported to your foreman, Mr. Chronopoulos, that you were cold and that he told you if you were cold to go sit in the cab of the truck and take Mr. Burnett's place and remain in there. Did that happen?

"A. I don't remember him telling me to get in no truck.

"Q. Well, did you get in the cab of the truck that night?

"A. Right on the last end of the job.

* * *

"Right on the last of the job, the last two or three joints we finished.

"Q. (By Mr. Ashton) Isn't it a fact, Mr. Dennis, that you got into the cab of that truck along about midnight and remained in the cab of the truck until the job was completed?

"A. No.

"Q. And isn't it a fact that you remained in the cab of that truck for two or three hours while the rest of the men were out on the track completing the job?

"A. No, it isn't right.

"Q. Well, did you stay in the truck at all that night and operate the truck lights?

"A. I turned the truck around.

"Q. *How long would you say you were in the truck?*

"A. *Not over thirty minutes altogether, turning it around and altogether.*" (R. 143, 144.)

It is interesting to note that the foreman had petitioner ride in the cold back end of the truck on the sixteen-mile return trip to Green River. (R. 201, 202.)

Misconceptions of Law

In addition to its overriding misconception of the law concerning the right of trial by jury, the Utah court has made a number of erroneous statements as to the status of the law. We cite only a few.

1. In addressing itself to petitioner's evidence as to what more should have been done to protect the crew from overexposure the Utah court stated:

> "In so far as the record reveals, these claims are fashioned of nothing more substantial than conjecture and there is no reasonable basis to hold the railroad negligent on either count."

With regard to the conjecture argument this court stated in *Lavender v. Kurn*, supra:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. *Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.*" (Italics ours.)

See also on the matter of conjecture the case of *Gibson v. Elgin, Joliet & Eastern R. Co.*, 246 F. 2d 834 (7th Cir. 1957).

2. The Utah court states:

> "However extensive the railroad's duty to its employees for their safety has become, it has never extended to the supervision of the attire of its section hands."

The Utah court is incorrect in making the foregoing statement. The following cases impose the duty on railroads of exercising ordinary care in supervising the attire of employees: *Ferrara v. Boston & Maine Railroad*, 338 Mass. 323, 155 N.E. 2d 416 (1959) (failure to furnish employee with helmet while welding). *Fitzpatrick v. St. Louis-San Francisco R. Co.*, Mo., 327 S.W.2d 801 (1959) (failure to furnish goggles; loss of eye because of dust). *Spears v. Atchison, T. & S.F.R. Co.*, 255 F.2d 780 (7th Cir. 1958) (failure to furnish rubber boots to protect feet from diesel and fuel oils). *Williams v. Atlantic Coast Line R. Co.*, 190 F.2d 744 (5th Cir. 1951) (failure to furnish lifesaving equipment where working on washout). *Young v. Clinchfield R. Co.*, 288 F.2d 499 (4th Cir. 1961) (failure to furnish respirator to employee working behind cribbing machine).

3. The Utah court apparently is of the opinion that if an additional crew was not available, the railroad is absolved from responsibility. The court states:

> "Other than the reference to its attempt to try to get the one more crew member who couldn't be located, there is no evidence that more men or crews were available."

This is a novel defense against the claim of insufficient help, but it has no legal support. The following cases support findings of negligence for failure to provide sufficient help, and hold that the duty of providing sufficient help is nondelegable. *They do not impose on an injured workman the duty of proving that other workmen were standing in the wings waiting to be called into the game.* See *Blair v. Baltimore & O. R. Co.*, supra:

Bourquet v. Atchison, T. & S.F.R. Co., 65 N.M. 207, 334 P.2d 1112 (1959); *Davis v. Virginian R. Co.*, supra; *Southern Railway Co. v. Welch*, 247 F. 2d 340 (6th Cir. 1957); *St. Louis-San Francisco R. Co. v. King*, Okl., 368 P.2d 835 (1961).

In addition to being incorrect as to the law, the Utah court is incorrect as to the fact. One member of the crew was simply missing, Delmar H. Powell. He could have held the light while another man was at the fire *and thus made it possible to keep the work going on two joints at a time, had he been present.* The work was actually being done in the territory of the Cedar crew, which was being used elsewhere. (R. 92, 93, 96.)

4. Petitioner cited the *Rogers* case, supra, to the Utah court and was met with the following statement:

> "Plaintiff also urges application to our case of certain language from Rogers v. Missouri Pacific Railroad Company:
>
> "'. . . The test of a jury case is simply whether the proofs justify with reason the conclusion that the *employer negligence played any part, even the slightest*, in producing the injury . . .' (Emphasis added.)
>
> "*We do not understand the emphasized phrase upon which plaintiff places great reliance in support of his position, as referring to the question whether negligence did or did not exist.* It will be noted that the statement proceeds upon the assumption that there is negligence and refers to the quantum thereof. It says in effect that if there is negligence, which played any part in causing the plaintiff's injury, even the slightest, the defendant is responsible for whatever proportion of the damages it caused. But it does not

> suggest any the less necessity for finding negligence, nor that 'even the slightest' fault might be found to be negligence." (Italics ours.)

The Utah Court states that the liberal test pronounced in the *Rogers* case applies to the causation issue but not to the issue of negligence. A peremptory reading of the leading cases on the issue of negligence, as well as on the issue of proximate cause, demonstrates that there is no such nice distinction in quantum of proof between negligence and causation. See *Wilkerson v. McCarthy*, supra; *Lavender v. Kurn*, supra; *Tiller v. Atlantic Coast Line R. Co.*, supra; *Bailey v. Central Vermont R. Co.*, supra; *Tennant v. Peoria & P. U. R. Co.*, supra.

The *Rogers* case made no such distinction. The following language from the Rogers case indicates that the Utah court is wrong on this point as well as on so many others.

> "The Congress when adopting the law was particularly concerned that the issues *whether there was employer fault* and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair-minded men could reach these conclusions on the evidence." (Italics ours.)

Erosion of the Federal Employers' Liability Act

The Utah court states:

> "The writer believes it is unfortunate that there is not a compensation act so that this plaintiff and others similarly situated could be compensated for injuries suffered in performing the duties of employment without all of the tribulations and the risks involved in a contentious litiga-

> tion to determine where fault lay, often as here, without success. But that is the responsibility of Congress."

The United States Supreme Court has also addressed itself to this subject, where it is said in the *Rogers* case:

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this court of its obligation to effectuate the present congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction."

And again:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of the right to a jury determination."

In Utah there has been an unfortunate erosion of the right to a jury trial in Federal Employers' Liability Act cases.

In *Pauly v. McCarthy*, supra (1946), plaintiff had received a verdict under the Federal Employers' Liability Act for injuries sustained when he fell while alighting from a caboose. Defendant appealed. The Utah court reversed, holding as a matter of law that

there was insufficient evidence for the jury. In a stout effort, as demonstrated by the fact the decision was thirty-three pages long, the Utah court assumed the role of the jury and held that an unlighted and unguarded walkway along the bridge on a passing track at Chacra, Colorado, was not a place to work, and that defendant had no duty to make it reasonably safe. It stated:

> "If the passing track at Chacra is a place to work, then every other passing track on the road is by the same token a place to work."

Just as in the case at bar, plaintiff had cited *Bailey v. Central Vermont R. Co.*, supra, as controlling authority. The Utah court attempted to distinguish the *Bailey* case by pointing out that the car involved in the *Bailey* case had been "spotted" on the bridge, and that the bridge was a "definite and assigned place to work." The Supreme Court of the United States reversed in a per curiam opinion, citing *Bailey v. Central Vermont Railway*, supra, and *Ellis v. Union Pacific R. Co.*, supra.

The lesson of the *Pauly* case was not well learned. The same issue was once again presented to the Utah court in *Wilkerson v. McCarthy*, supra (1947). In the *Wilkerson* case plaintiff had brought an action under the Federal Employers' Liability Act for personal injuries sustained when he fell from a board across a wheel pit. He was an engine foreman and was moving from one place in the yard to another in the performance of his duties. The Utah court argued the facts at great length, pointing out that the wheel pit was used for wheel pit employees, and that the posts and chains had been erected around the pit as a warning to *other* em-

ployees not to use the plank across the pit as a walkway. The Utah court minimized plaintiff's evidence that employees other than wheel pit employees had continued to use the plank as a walkway for a period of approximately two and a half months following installation of the chains and posts. The Utah court said that such slight evidence did not establish a custom and practice which would make a jury question of notice to the railroad company. The Utah court again attempted to distinguish the *Bailey* case and stated that the evidence was much more slight and therefore the language of the *Bailey* case was inapplicable. This court unanimously reversed and remanded the case for a new trial and pointed out that the basic error of the Utah Supreme Court was indicated by the manner in which the opinion discussed disputed questions of fact, stating:

> "Thus the conflict as to continued use of the board as a walkway after erection of the chains was whether the pit workers alone continued to use it as a walkway, or whether employees generally so used it. While this left only a very narrow conflict in the evidence, it was for the jury, not the court, to resolve the conflict.
>
> "*It was only as a result of its inappropriate resolution of this conflicting evidence that the State Supreme Court affirmed the action of the trial court in directing the verdict.*" (Italics ours.)

The strange claim of the Utah Supreme Court that the *Rogers* case requires one quantum of proof for negligence and another for proximate cause is reminiscent of another experience the Utah court had with the United States Supreme Court in the case of *Coray v. Southern Pacific Co.*, supra (1949), where the Utah court affirmed the trial court in granting a motion for

nonsuit in a Federal Employers' Liability Act death case. Certiorari was granted by the United States Supreme Court and the case reversed. In the *Coray* case the Utah court considered the stopping of the train to be a cause "in a philosophical sense" but not a cause "in a legal sense." The Supreme Court of the United States discussed niceties of language to defeat the right of trial by jury:

> "The language selected by Congress to fix liability in cases of this kind is simple and direct. Consideration of its meaning by the introduction of dialectical subtleties can serve no useful interpretative purpose."

See also the case of *Siciliano v. Denver and Rio Grande Western R. Co.*, 12 Utah 2d 183, 364 P. 2d 413 (Aug. 24, 1961), where the Supreme Court of Utah again ruled as a matter of law that a jury question was not made out by the evidence. This case was settled before it could be reviewed by the United States Supreme Court. It stands as an unfortunate and incorrect legal precedent in Utah. See the dissent of Mr. Justice Crockett. Compare the case of *Birmingham Southern R. Co. v. Ball*, Ala., 126 So.2d 206 (Jan. 12, 1961), where an opposite result obtained from a similar fact situation.

POINT II

THE SUPREME COURT OF UTAH IMPROPERLY HELD AS A MATTER OF LAW THAT PETITIONER'S NEGLIGENCE IN NOT LEAVING HIS WORK AND SEEKING PROTECTION FROM THE COLD WAS

THE SOLE PROXIMATE CAUSE OF HIS INJURIES.

The Federal Employers' Liability Act expressly eliminates contributory negligence as a bar to recovery (U.S.C.A., Title 45, Sec. 53), but allows diminution of the verdict. The jury, under proper instructions, found petitioner negligent and reduced the verdict by $10,000.00. The Supreme Court agreed that petitioner was negligent and went on to say:

> "... it seems quite inescapable that it was the plaintiff's own conduct ... that resulted in this regrettable injury."

Thus the Utah court defeated petitioner by resort to the simple expediency of calling contributory negligence, in effect, "sole proximate cause."

This court denounced such subterfuge in *Grand Trunk Western R. Co. v. Lindsay*, 233 U.S. 42, 34 S.Ct. 581, 58 L.Ed. 838 (1914), in the following language:

> "... and if the cause of action is established by showing that the injury resulted 'in whole or in part' from defendant's negligence, the statute would be nullified by calling plaintiff's act the proximate cause and then defeating him, when he could not be defeated by calling his acts contributory negligence."

See also to the same effect *Tiller v. Atlantic Coast Line R. Co.*, supra; *Illinois Central R. Co. v. Skaggs*, 240 U.S. 66, 36 S.Ct. 249, 60 L.Ed. 528 (1916); *Union Pacific R. Co. v. Hadley*, 246 U.S. 330, 38 S.Ct. 318, 62 L.Ed. 751 (1918); *Spokane & Inland Empire R. Co. v. Campbell*, 241 U.S. 497, 36 S.Ct. 683, 60 L.Ed. 1125 (1916).

In determining as a matter of law that petitioner's conduct was the sole proximate cause of his injuries, the court entirely overlooked certain significant facts.

The foreman and petitioner were together in nighttime, windy, zero weather for twelve hours. They were in a precisely equal position to observe conditions and to appreciate the danger from overexposure. The Utah court imposed sole responsibility on petitioner for not observing these conditions, leaving the work to his fellow crew members, defying the authority of the foreman, and seeking out a comfortable and safe refuge. At the same time the Utah court held as a matter of law that the foreman in charge had no responsibility of observing conditions or taking measures for the safety of his men. No consideration was given to the question of reasonable foreseeability of harm from the adverse working conditions, or the fact that the foreman had absolute and unquestioned authority over his men and responsibility for their safety. By his own testimony the foreman had noticed petitioner was not warmly enough dressed. (R. 196.) Yet he continued to let him work through the night in weather that was the coldest petitioner ever remembered working in at night (R. 92.), and even selected petitioner to go through the snow three hundred yards to get the truck when he knew petitioner was the only man who wasn't wearing overshoes. (R. 196.)

It is difficult to follow the judicial contortion indulged by the Utah court. This is not even the type of "close or doubtful" case mentioned in the *Bailey* case, supra. Rather it would seem to be the type of case that would more readily lend itself to the procedure adopted

by this court in *Strickland v. Seabord Air Line R. Co.*, supra, where certiorari was granted and the judgment of the Florida court (80 So.2d 914) reversed and the verdict reinstated without the necessity of further briefs, arguments, or proceedings.

POINT III

THE SUPREME COURT OF UTAH IMPROPERLY HELD AS A MATTER OF LAW THAT PETITIONER WAS HIMSELF IN THE BEST POSITION TO JUDGE AND APPRAISE THE DANGER OF OVEREXPOSURE AND THUS IMPROPERLY RESURRECTED THE DOCTRINE OF ASSUMPTION OF RISK AS A BAR TO PETITIONER'S RIGHT OF RECOVERY.

In 1939 Congress amended the Federal Employers' Liability Act by eliminating assumption of risk as a defense. See 53 Stat. 1404, C. 685, 45 U.S.C.A., Sec. 54. See Appendix D. The leading case interpreting the aforesaid amendment is *Tiller v. Atlantic Coast Line R. Co.*, 128 F.2d 420, 318 U.S. 54, 63 S.Ct. 444, 87 L.Ed. 610. The lower court in dismissing plaintiff's case had said:

> "The conclusion is inescapable that Congress did not intend to enlarge the obligation of carriers to look out for the safety of their men when exposed to the ordinary risks of the business, and that in circumstances other than those provided for in the amended section of the statute, the doctrine of the assumption of the risk must be given its accustomed weight."

The United States Supreme Court rejected this position and stated:

> "We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'."

And again:

> "The theory that a servant is completely barred from recovery for injury resulting from his master's negligence, which legislatures have sought to eliminate in all its various forms of contributory negligence, the fellow servant rule, and assumption of risk, must not, contrary to the will of Congress, be allowed recrudescence under any other label in the common law lexicon."

The Utah Supreme Court did not follow the *Tiller* case when it decided the *Pauly* case, supra. In that case we find the following language:

> "It is to be hoped that in industry generally this differentiation between a workman having assumed the risks of his employer's negligence by continuing in the employment after he has notice of the danger, and the assumption of risks inherent in the industry difficult or impossible to eliminate, will be noted by the courts and given its former one time place in the law."

But the hope expressed in the *Pauly* case was repudiated when this court reversed the *Pauly* case in the per curiam opinion to which we have heretofore referred.

Now we find camouflaged in platitudinous language another attempt to resurrect the doctrine of assumed risk in a Federal Employers' Liability Act case. The opinion of the Utah court contains the following language:

> "Neither party can be blamed for the cold weather. Both were fully aware of it. . . The plaintiff himself was in the best position to know how to dress himself for his work . . . plaintiff alone could know how cold he was; that he could best judge what to do about it and communicate the fact to others . . . it seems quite inescapable that it was the plaintiff's own conduct with respect to his clothing and/or in caring for his own person in the cold, that resulted in this regrettable injury."

Said language indicates that the Utah court has again fallen into the error warned against by Mr. Justice Holmes where he states in *Schlemmer v. Buffalo R. & P. R. Co.*, 205 U.S. 1, 27 S.Ct. 407, 51 L.Ed. 681 (1907):

> ". . . unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name."

In *Gulf, Colorado & S.F.R. Co. v. Waterhouse*, Tex. Civ. App., 223 S.W. 2d 654 (1949), the appellate court sustained a finding that a foreman was negligent in ordering plaintiff to work after plaintiff complained to him of the effects of heat. Defendant had argued that the foreman was not negligent, *because plaintiff was himself the best judge of his own strength, and that it could be assumed that plaintiff would avoid becoming overheated.* The court stated at page 661:

> "... but they bring to mind applications of the defense of assumed risk and suggest further that plaintiff's return to work and his performing work amounted to negligence on his own part and that this negligence was the sole cause of his injury. The Federal Employers' Liability Act applies to this case, as plaintiff has pointed out, and thus the defense of assumed risk, including the extensions of this defense referred to in Tiller v. Atlantic Coast Line R. Co., is not available to defendant."

Of particular application to this issue is the language of *Williams v. Atlantic Coast Line R. Co.*, supra, where the court stated:

> "Indeed, even though the employee may know that the employer has been negligent in the furnishing of a safe place to work or necessary safety equipment, the employee does not under this act assume the risks of such danger."

Respondent's foreman admitted that he felt petitioner was insufficiently clothed, yet he continued to supervise the work and to thus expose petitioner to a *known* danger. This fact alone would be sufficient to support petitioner's verdict.

CONCLUSION

The Utah court has denied petitioner the right of trial by jury with the statement:

> "Practically any type of industrial accident could in some way have been prevented by the application of precautions perceivable by hindsight. If nothing else, the plaintiff could have 'stood in bed.'"

If the opinion of the Supreme Court of Utah is permitted to stand, the Federal Employers' Liability Act will not afford railroad workers in Utah the same remedy that it affords in other jurisdictions where the decisions of this court are respected and followed. It will not do to say in Utah that the decisions of this court are controlling where the interpretation and effect of the Federal Employers' Liability Act is involved, since trial courts usually follow the decisions of their immediate appellate courts. Contributory negligence is called "sole proximate cause" in Utah, and liability is denied as a matter of law.

It is respectfully submitted that the opinion of the Utah court is in conflict with the express provisions of the Federal Employers' Liability Act and controlling decisions of this court construing that Act. For the reasons herein set forth a writ of certiorari should be granted and petitioner's verdict reinstated.

Respectfully submitted,

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(APPENDICES A, B, C and D FOLLOW)